



March 28, 2002

Mr. Jose R. Guerrero  
Montalvo & Ramirez  
900 North Main  
McAllen, Texas 78501

OR2002-1541

Dear Mr. Guerrero:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 160497.

The LaJoya Independent School District (the “school district”), which you represent, received a request for information relating to the contract between the school district and the requestor’s client for the construction of a football stadium grandstand. You indicate that the school district will release the school board meeting minutes responsive to the request. You claim that the remainder of the requested information is excepted from disclosure under section 552.103 of the Government Code. We have also received arguments from the requestor. *See* Gov’t Code § 552.304. We have considered all of the submitted arguments and reviewed the submitted information.

We begin by addressing the requestor’s contention that the school district did not meet its deadlines under section 552.301 of the Government Code. Subsections 552.301(a) and (b) provide:

- (a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act’s] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.
- (b) The governmental body must ask for the attorney general’s decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

...

(d) A governmental body that requests an attorney general decision under Subsection (a) must provide to the requestor within a reasonable time but not later than the 10th business day after the date of receiving the requestor's written request:

(1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general about whether the information is within an exception to public disclosure; and

(2) a copy of the governmental body's written communication to the attorney general asking for a decision, or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication.

The request is dated December 27, 2001. You inform this office that the school district was closed from December 21, 2001, through January 8, 2002.<sup>1</sup> Thus, you state that the earliest date on which the school district could have received the request was January 9, 2002. The school district's request for a ruling from this office, a copy of which you indicate was sent to the requestor, is post marked January 21, 2002, well within ten business days from January 9. The requestor contends that the school district was in fact open for business during the time that you indicate it was closed. Thus, we are faced with a factual dispute over when the school district was open. We cannot resolve disputes of fact in the open records process, and therefore, we must rely on the representations of the governmental body requesting our opinion. Open Records Decision Nos. 554 (1990), 552 (1990). Based on the school district's representations, we find that it requested a decision from this office and provided the requestor with the appropriate information within the ten-business day deadline imposed by section 552.301(b) and (d).

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

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<sup>1</sup>The school district submitted an affidavit from its superintendent supporting this assertion.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate . . . .

Gov't Code § 552.022(a)(1), (3), (5). Exhibit D contains some completed reports and Exhibit H consists entirely of completed reports for the purpose of section 552.022(a)(1). Exhibit B is a contract relating to the expenditure of public funds for the purpose of section 552.022(a)(3). Likewise, Exhibit D contains information that is subject to section 552.022(a)(3). Exhibits D, E, F, and G also contain information that is subject to section 552.022(a)(5). Because this information is subject to section 552.022, it may only be withheld if it is confidential under other law. Section 552.103 is a discretionary exception and is not other law for the purpose of section 552.022. *See* Open Records Decision No. 663 (1999) (governmental body may waive section 552.103). Therefore, pursuant to section 552.022, the school district must release Exhibits B and H in their entirety as well as portions of Exhibits D, E, F, and G.

With respect to the remainder of the information, we address your section 552.103 argument. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The school district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that a governmental body receives the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The school district must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>2</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

In support of your contention that litigation against the school district is reasonably anticipated, you have provided this office with two letters sent to the school district by the requestor's office. In the first letter, dated October 26, 2001, the requestor's office demands arbitration of a dispute with the school district concerning the payment of a subcontractor on the grandstand project. In their second letter, dated November 19, 2001, the requestor's office indicates that the school district did not respond to the arbitration demand and asks the school district again to submit to arbitration in order to avoid going to court to resolve the dispute. You state that the school district maintains that it is not liable and that no enforceable arbitration agreement exists between the school district and the requestor's client. Based on the information you have provided, we agree that litigation is reasonably anticipated against the school district. Furthermore, we find that the submitted information relates to the anticipated litigation.

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<sup>2</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Here, the submitted information contains documents that have been seen by the requestor's client. This information is not protected under section 552.103 and must be released.

Thus, with the exception of the information that is subject to section 552.022 and the information that has already been seen by the requestor, the school district may withhold the submitted information under section 552.103 of the Government Code.<sup>3</sup> We have marked information that is not protected under section 552.103 and must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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<sup>3</sup>The applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 160497

Enc: Submitted documents

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(w/o enclosures)